

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL SECURITY PROJECT
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MARK H. LYNCH
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Staff Counsel

May 16, 1985

Mr. Harold Weisberg
7627 Old Receiver Road
Frederick, Maryland 21701

Dear Harold:

Yesterday I received your letter of May 13 and also from Con Hitchcock a draft affidavit by Jim (copy enclosed).

Let me address the affidavit first. Con tells me that Jim wants you to review it and suggest changes if you think it contains any inaccuracies. I have a somewhat stronger view of Jim's responsibility to you before he files this affidavit. As I have written to Con (copy enclosed), some of the statements seem to me to disclose privileged attorney-client communications. Accordingly, I do not think Jim can properly file this affidavit unless you affirmatively consent to the disclosure of those communications. Please let me know how you feel about this.

Jim's affidavit also raises a possible defense for you against an award of attorneys fees, which I should call to your attention. It is clear from paragraph 5 of the affidavit that in the meeting at your house, your position was that you did not want to respond to the government's discovery. If Jim has simply and respectfully conveyed that position to Judge Smith, with an acknowledgement that the case would be dismissed so you could challenge the discovery order on appeal, then there would have been no need for the subsequent motions which antagonized Smith and for which he assessed fees. Bear in mind that at the point you and Jim met, Smith had denied the government's requests for fees.

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Paragraphs 6 and 7 indicate that instead of following your wishes, Jim took it upon himself to come up with answers to the interrogatories and made a representation to the court that he needed additional time to complete answers. It was his failure to deliver on this representation which particularly antagonized Smith. On the basis of Jim's own statements, I could make an argument that the portion of the litigation for which fees have been assessed was his responsibility rather than yours. This argument might shield you from any liability for fees.

I know you are reluctant to shift responsibility to Jim. On the other hand, he's trying to shift all responsibility to you, and, from my examination of the record, I think he bears a lot of responsibility for the way this litigation deteriorated. Whether you want me to make the foregoing argument is up to you. Please let me know.

I suppose that one reaction you will have to the foregoing question is to reiterate the points made in your letter of May 13 (and your other communications) that the government is at fault here rather than either Jim or you. I agree with you on that, but the courts haven't. The questions on the present remand are, as the court of appeals wrote:

- (1) Whether the documentation submitted and to be submitted by the government to support its request for attorneys fees satisfies our test in Concerned Veterans, and
- (2) The proper division of responsibility between lawyer and client for the conduct which led to the award of expenses, with findings by the District Court which apportion their liability.

In my view, as far as the further litigation of this case is concerned, all of the government's misconduct is irrelevant because the court of appeals ruled that it wasn't misconduct. That was a bad decision, but we are stuck with it. The only issues remaining are the two identified by the court of appeals.

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I know that you may disagree deeply with my analysis of what is relevant at this point, but I have maintained all along that in representing you on remand I would limit myself to the issues identified by the court of appeals and would not attempt to relitigate issues that have been settled.

This leads me to another option which I think I should raise for your consideration. If you think that I am taking too narrow an approach to the remaining issues, you can discharge me and represent yourself. Smith has rescheduled the hearing for 10:30 a.m. on June 11, and you could appear on your own behalf to raise all the matters you wish to raise.

I do not recommend this approach because I do not think Smith will let you get very far with it, and I think I can do a good job of trying to avoid or limit your liability for fees within the framework that I believe Smith and the court of appeals will allow. I do not want to withdraw from this case because I think there has been injustice and I am willing to try to limit or contain it. However, I do not think that I can do all the things you would like to have me do, and for that reason I am obliged to raise the option of your discharging me and representing yourself, even though I do not advise it.

If you do decide to discharge me, please be assured that there will be no hard feelings. I deeply respect your courage and tenacity, and I certainly take into account that your greater experience has given you more wisdom than I have. But in the end I have to follow my own judgment and conscience about what is possible within the confines of a lawsuit, or, more precisely, the confines of the remand in this case. If you decide that you want to do things differently and on your own, I certainly will respect that decision.

Please let me know how you want to proceed.

With best regards,

Sincerely,



Mark H. Lynch

ML/skh